158-441

PHILADELPHIA LAW ASSOCIATION

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 266.

THE NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED AUGUST 13, 1891.

(14,802.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1894.

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1 In the Supreme Court of the United States, October Term, 1891.

NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA.
} No. —.

Surwrit of error by the New York, Pennsylvania & Ohio Railroad Company to the supreme court of Pennsylvania.

Assignment of Errors.

I. The learned court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in its second conclusion of law, as follows: 'That the taxation of such receipts does not offend against art. IX, section 1, of the constitution of Pennsylvania or against the commercial clause of the Federal Constitution.'"

II. The learned court erred in not sustaining the company's fourth exception to the decision of the court of common pleas of Dauphin county, viz:

"That the learned court erred in not finding as a conclusion of law that the attempted taxation is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power to 'regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

III. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the New York, Pennsylvania & Ohio Railroad Company.

2 IV. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of the United States of America:

Your petitioner prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

3 [Endorsed:] In U. S. Supreme Court. New York, Pennsylvania & Ohio Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Assignment of errors. M. E. Olmsted.

4 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York, Pennsylvania and Ohio Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or
5 of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Filed in supreme court, middle district, Aug. 6, 1891.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein The New York, Pennsylvania and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

7 [Endorsed:] New York, Pennsylvania & Ohio Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Citation. Filed in supreme court, middle district, Aug. 6, 1891.

On this fifth day of August, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared A. C. Stamm before me, the subscriber, prothonotary of the supreme court of Pennsylvania, for the middle district thereof, and makes oath that he delivered a true copy of the within citation to James S. Stranahan, deputy attorney general of the Commonwealth of Pennsylvania. August 5, 1891.

A. C. STAMM.

Sworn to and subscribed before me the day and year aforesaid.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

8 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 143, Jan. term, 1890, is contained the following:

In Common Pleas of Dauphin County, Jan. Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, PENNSYLVANIA & OHIO R. R. COMPANY. } No. 143.

Kirkpatrick; Olmsted.

Appeal from settlement by the State treasurer and auditor general.

Oct. 14, 1889.—Appeal and specifications of objection filed.
Feb'y 7, 1890.—Bond filed.
9 Feb'y 7, 1890.—*Narr.* and copy of account filed.
March 31, 1890.—Stipulation to try without jury filed.
April 29, 1890.—Stenographer's notes and agreement as to facts filed.
April 29, 1890.—Opinion and finding of the court filed, finding that there is due the Commonwealth by the defendant the sum of thirty-three and $\frac{13}{100}$ dollars ($33.13) and costs.
May 27, 1890.—Defendant's exceptions filed.
Same day.—Exceptions overruled and judgment entered in accordance with opinion filed.
June 11, 1890.—Certiorari surappeal No. 5, May T., 1891, from supreme court received and filed.

Judgment of the Court.

This case was tried without a jury, under the act of April 22, 1874. The court directed judgment to be entered as follows:

Tax, 8 mills upon $3,750	$30 00
Interest at 12 per cent. from November 16, 1889, to April 29, 1890	1 63
Attorney general's commission	1 50
Total	$33 13

10 *Appeal.*

In the matter of the account for tax on gross receipts for the six months ending June 30, 1889, amounting to $712.51, settled by the auditor general of Pennsylvania September 12, 1889, and approved by the State treasurer September 17, 1889, a copy of which account is hereunto attached.

The said New York, Pennsylvania & Ohio Railroad Company, having paid, or proposing to pay, into the State treasury the sum of $682.51, being the full tax at eight mills upon the company's receipts derived from tolls and transportation and from express business wholly within the State, hereby appeals from said settlement of account to the court of common pleas of Dauphin county, and files the following specifications of objections thereto, agreeably to the provisions of the act of assembly in such case made and provided.

1. The account hereby appealed from includes tax to the amount of $30 upon $3,750 receipts derived from the Lake Shore and Michigan Southern Railway Company, as rental for use of the tracks of The New York, Pennsylvania & Ohio Railroad Company, appellant. Said tax is improperly and illegally charged, because the seventh section of the act of June 7, 1879, under which said tax is claimed, imposes tax only upon receipts "for tolls and transportation, telegraph business, or express business."

2. The Lake Shore and Michigan Southern Railway Company has paid, or is liable to pay, a tax upon that portion of its receipts derived from transportation within the State of Pennsylvania over the tracks of the corporation appellant, and if the seventh section of the act of June 7, 1879, or any other act of assembly, can be construed to impose upon the corporation appellant an additional tax in respect of receipts derived as rental from the Lake Shore and Michigan Southern Railway Company, then said act is unconstitutional and void, because in conflict with section 1 of article IX of the constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

3. The taxation of the receipts of the corporation appellant derived as rental from the Lake Shore and Michigan Southern Rail-
11 way Company would result in double taxation, which is not warranted by the act of June 7, 1879, or any other act of assembly, and which is never to be presumed in the absence of express authority of law.

4. The business conducted by the Lake Shore and Michigan Southern Railway Company over the tracks of The New York, Pennsylvania and Ohio Railroad Company, appellant, and for which $3,750 was paid by said Lake Shore and Michigan — Railway Company, consisted exclusively of the transportation of freight and passengers from points in other States to points in Pennsylvania, or from points in Pennsylvania to points in other States, or from points in other States to points in other States, passing through Pennsylvania. The taxation of the receipts of the corporation appellant derived from the rental of its tracks to the Lake Shore and Michigan Southern Railway Company, for conducting such interstate business, would be an interference with interstate commerce, and as such would be in conflict with that clause of section 8 of article I of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of such tax, is, therefore, unconstitutional and void.

5. The New York, Pennsylvania and Ohio Railroad Company having paid, or proposing to pay, into the State treasury, the sum of $682.51, being the full tax at eight mills upon the company's receipts from tolls and transportation, or from express business wholly within the State of Pennsylvania, it is not indebted to the Commonwealth

in any further sum, and the balance claimed in the settlement hereby appealed from is erroneously and illegally charged.

Harrisburg, Pa., October 8, 1889.

NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY,

(Signed) By its attorney, M. E. OLMSTED.

12 *Account.*

New York, Pennsylvania and Ohio Railroad Co. in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts per act of June 7th, 1879, for six months ending June 30, 1889, as per reports herewith filed:

Gross receipts	$89,063 67
Tax at rate of eight-tenths of one per cent	$712 51
Due Commonwealth	$712 51

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Sept.* 12, 1889.

Settled and entered.

(Signed) JNO. A. GLENN,
For THOMAS McCAMANT,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *Sept.* 17, 1889.

Approved.

(Signed) WM. LIVSEY,
For WM. B. HART,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Sept.* 18, 1889.

I hereby certify, that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office, the day and year aforesaid.

(Signed) JOHN A. GLENN,
[SEAL.] For THOMAS McCAMANT,
Auditor General.

13 *Report.*

This report includes the receipts of N. Y., P. and O. R. R. proper, Sharon R'y, Westerman R. R., New Castle and Shenango Valley R. R.

To the auditor general of Pennsylvania:

In accordance with the requirements of the seventh section of an act entitled "An act to provide revenue by taxation," approved June 7, 1879, as treasurer of the New York, Pennsylvania and Ohio Rail-

road Company, I make the following report of the gross receipts of said company for the six months ended June 30, 1889.

(Signed) EDWARD WHITE, *Treasurer.*

Office of the treasurer New York, Lake Erie and Western Railroad Company.

21 CORTLANDT ST., NEW YORK, *August* —, 1889.

Gross receipts derived from all sources		$2,915,191 98
Gross receipts from traffic or business done wholly within the State		91,810 49
That is to say:		
From tolls and transportation (not including U. S. mails)	$80,466 98	
From transportation of U. S. mails	2,746 82	
From telegraph business		
From telephone business		
From express business (Wells, Fargo & Co.)	4,846 69	
From transportation of coal mined, purchased, or sold		
From all other sources (see marginal note)	3,750 00	
Total receipts within the State		$91,810 49

Marginal Note.

This item, $3,750.00, was received from the Lake Shore and Michigan Southern railway, as rental for the use of the tracks of the New York, Pennsylvania and Ohio R. R. in Pennsylvania.

STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 20th day of August, A. D. 1889, personally appeared before me, a notary public in and for the State and county aforesaid, Edward White, treasurer of the New York, Lake Erie and Western Railroad Co., lessee of the New York, Pennsylvania and Ohio Railroad Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct, and that the company has accounted for and returns herewith gross receipts for transportation of coal mined, purchased, or sold, at the same rates as are charged for the transportation of similar freight for other companies or individuals.

(Signed) EDWARD WHITE, *Treasurer.*

Sworn and subscribed before me, the day and year aforesaid.

[SEAL.] (Signed) CHARLES STEELE,
Notary Public (95), *New York County.*

14 Know all men by these presents that we, the New York, Pennsylvania & Ohio Railroad Company and American Surety Company of New York, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of sixty dollars ($60), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company and dated the 5th day of February, A. D. 1890.

Whereas the above-bounden New York, Pennsylvania & Ohio Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on gross receipts amounting to seven hundred and twelve and $\frac{51}{100}$ dollars ($712.51), made by the auditor general on the 12 day of Sept. and approved by the State treasurer on the 17 day of Sept., 1889, upon which $682.51 has been paid into the State treasury:

Now, the condition of this obligation is such that if the said New York, Pennsylvania & Ohio R. R. Company shall prosecute its said appeal with effect and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

NEW YORK, PENNSYLVANIA & OHIO R. R. COMPANY,
By CHARLES E. WHITEHEAD, *President.*

Attest:

[Seal of N. Y., P. & O. R. R. Co.]

THOS. WARNOCK, *Secretary.*

AMERICAN SURETY CO. OF NEW YORK,
By DAVID G. SICKELS, *2nd Vice-president.* [SEAL.]
WYLLYS BENEDICT,
Assistant Secretary. [SEAL.]

[Seal of American Surety Company.]

Signed, sealed, and delivered in presence of—
H. G. HINTON.

The security of the above bond is approved.

(Must be signed by a judge of some court in county where sureties reside.)

SIMON M. EHRLIE,
Justice of the City Court of New York.

Feb. 6th, 1890.—The security of the within bond approved by the court.

J. W. SIMONTON, *P. J.*

15 In Dauphin Common Pleas.

No. 142, Jan. Term, 1890.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the New York, Pennsylvania and Ohio Railroad Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the 17th day of September, A. D. 1889, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of seven hundred and twelve $\frac{51}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled and signed by the auditor general and State treasurer of this Commonwealth and duly entered in the books of their respective offices, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per centum per annum, from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, for tax on gross receipts, per act of June 7th, 1879, for six months ending June 30th, 1889, a copy of which said account was thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and — appealed from; whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges, and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money.

And whereas, also, the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the use
16 of the said plaintiff, and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general and State treasurer of this Commonwealth against the said defendants, on the day and year in the first count mentioned, for tax on gross receipts;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request: Yet the said defendants have disregarded their said promises and, although often requested so to do, have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars; and therefore she brings suit, &c.

JOHN F. SANDERSON,
Deputy Attorney General.

17 New York, Pennsylvania and Ohio Railroad Co. in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts per act of June 7th, 1879, for six months ending June 30th, 1889, as per report herewith filed:

Gross receipts.....	$89,063 67
Tax at rate of eight-tenths of one per cent..... ...	$712 51
Due Commonwealth.....	$712 51

Interest at 12 per centum from 60 days after date of settlement; remit to State treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *June* 12, 1889.

Settled and entered.

JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, PA., *Sept.* 17, 1889.

Approved.

WM. LIVISEY,
For WM. B. HART,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Oct.* 10, 1889.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

[Seal of the Auditor General.]

18 *Stipulation to Try Without Jury.*

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, PENNSYLVANIA AND OHIO R. R. Co. } No. 143.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

(Signed) JNO. F. SANDERSON,
Deputy Attorney General.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

March 31, 1890.

Endorsed: No. 143, Jan. term, 1890. Commonwealth *vs.* New York, Pennsylvania and Ohio R. R. Co. Stipulation to try without jury. Filed March 30, 1890.

19 *Stenographer's Notes.*

Dauphin County Court of Common Pleas, January Term, 1890.

COMMONWEALTH
vs.
NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY. } No. 143. Gross Receipts.

Tried before Hon. J. B. McPherson, additional law judge, at Harrisburg, Pa., Monday, March 31, 1890.

Appearances: Plaintiff, Hon. W. S. Kirkpatrick, attorney general; Hon. Jno. F. Sanderson, deputy attorney general. Defendant, M. E. Olmsted, Esq.

Recorded and transcribed in compliance with the provisions of the act of assembly of May 24, 1887.

(Signed) EDGAR L. KING,
Official Stenographer.

Stipulation for trial without a jury filed.

JOHN A. GLENN, called by plaintiff, sworn.

Examined by Mr. SANDERSON:

Q. Please produce the report and settlement in this case?

A. I have the settlement made December 17, 1889, for tax on gross receipts for the six months ending June 30, 1889, amounting

to $712.51. This settlement was based upon a report made by the company covering that period of time.

By Mr. OLMSTED:

Q. State whether or not the gross receipt tax in that account includes an item of $3,750.00 mentioned in the return as
20 received from the Lake Shore and Michigan Southern Railway as rental for the use of the tracks of the defendant company?

A. That is included.

Mr. SANDERSON: The report and settlement are offered in evidence.

Mr. OLMSTED: Agreement dated March 31, 1890, signed by counsel for plaintiff and defendant, offered in evidence. (Marked "Exhibit A.")

Endorsed: 143. January T., 1890. Commonwealth *vs.* New York, Pennsylvania and Ohio R. R. Co. Stenographer's notes of testimony. Filed April 29, 1890.

21 ("EXHIBIT A.")

Agreement as to Facts.

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY. } No. 143.

And now, to wit, March —, 1890, it is hereby agreed that the item of $3,750 of receipts, the taxation of which forms the subject of the controversy in this suit, was paid by the Lake Shore and Michigan Southern Railway Company to defendant, in pursuance of the provisions of the agreement of October 1, 1888, marked Exhibit A, and attached hereto, which said agreement is made part of this agreement. It is further agreed that the Lake Shore and Michigan Southern Railway Company has reported to the auditor general its receipts derived from transportation over the railroad covered by this agreement, and has paid into the State treasury of Pennsylvania the tax imposed by the seventh section of the act of June 7, 1879, upon all of the said receipts which were derived from transportation between points both of which are in the State of Pennsylvania.

It is further agreed that one-half of the transportation by said Lake Shore and Michigan Southern Railway Company, over said railroad, was of freight and passengers carried by it continuously from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania.

It is also agreed that, on the 10th of February, 1890, the defendant corporation paid into the State treasury the sum of $682.51 on

account of tax on gross receipts for the six months ending June 30, 1889, being the account involved in this suit.

(Signed) JOHN F. SANDERSON,
Deputy Attorney General.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

Endorsed: No. 143, January term, 1890. Commonwealth of Pennsylvania *vs.* New York, Pennsylvania and Ohio Railroad Company. Appeal from the settlement of an account by the auditor general and State treasurer. Filed in the auditor general's office the 9th day of Oct., 1889. (Signed) Jno. A. Glenn for Thomas 22 McCamant, auditor general. Filed in the prothonotary's office the 14th day of October, 1889. —— ——, prothonotary. M. E. Olmsted, attorney for defendant.

Exhibit A.

The New York, Lake Erie & Western R. R. Co., the Lake Shore & Michigan Southern R'y Co., the New York, Pennsylvania & Ohio R. R. Co., and the Sharon railway.

Agreement, Dated October 1, 1888.

Agreement and lease, made this first day of October, A. D. 1888, between the New York, Lake Erie and Western Railroad Company, as lessee of the New York, Pennsylvania and Ohio Railroad, of the first part, hereinafter called "The Erie Company;" the Lake Shore and Michigan Southern Railway Company, of the second part, hereinafter called "The Lake Shore Company;" the New York, Pennsylvania and Ohio Railroad Company, individually and as lessee of the Sharon railway, of the third part, hereinafter called "The New York Company," and the Sharon railway, of the fourth part.

First. The said Erie Company, in consideration of the covenants by the Lake Shore Company hereinafter contained, hereby grants, demises, and leases unto the said Lake Shore Company the right to connect its tracks, or the tracks of the Shenango Valley Railroad Company's railroad at Sharon, Pennsylvania, with the tracks of the said Sharon railway, which are held and operated by said Erie Company under lease from the Sharon railway to said New York Company, and a lease from said New York Company to said Erie Company, dated May 1, 1883, for the term of ninety-nine (99) years from that date, at the point of connection of the Middlesex branch, so called, in such a manner as may be agreed upon by the engineers of said Erie and Lake Shore Companies, and during the continuance of this lease and agreement to maintain and use said connections.

Second. And said Erie Company doth also demise and lease unto the said Lake Shore Company the undivided one-half, to be used jointly and in common with said Erie Company for the passage of

its engines, cars and trains, and for its traffic and business, of
23 all that part of said Sharon railway, and said New York Company's railroad and right of way, so leased and held by said Erie Company, situated between such point of connection and the boroughs of Sharpsville and Middlesex, and in said boroughs of Sharpsville and Middlesex, in said State of Pennsylvania, said leased railroad being more particularly described as follows:

1st. That portion of the railroad of said Sharon railway and New York Company extending from said point of connection to a point eight hundred (800) feet northeasterly of the easterly switch of the river siding, so called, east of Sharpsville, as the same now exists, said easterly switch being about thirteen hundred and forty (1,340) feet easterly from the easterly end of the said New York Company over the Shenango river, the total length of said portion of said railroad being three and forty-six hundredths (3.46) miles.

2d. The railroad known as the Middlesex branch of said Sharon railway, extending from said point of connection of said branch southerly to the end of the track as the same now exists in the borough of West Middlesex, a distance of about six and eighty-two hundredths (6.82) miles, all of said railroad being situated in the county of Mercer and State of Pennsylvania. (The premises hereby leased are more particularly shown on a tracing map, marked "Exhibit A," hereto attached, and made a part of this agreement,) together with all branches, side tracks, switches, and passenger and freight stations, depot and storage grounds, water stations, warehouses, and terminal facilities appurtenant thereto, for and during the remainder of said term of ninety-nine (99) years, which will end on the 1st day of May, A. D. 1982, unless sooner terminated as herein provided; upon the following terms and conditions, to wit:

Third. The supervision and care of said portion of said railroad shall remain with the said Erie Company, and the movement of engines and trains thereon shall be under the direction and subject to the rules and regulations made by it from time to time and approved by the Lake Shore Company. Until notice in writing of disapproval of such rules and regulations by the Lake Shore Company, it shall be deemed to have approved the same. The train-
dispatcher of said Erie Company shall act as train-dispatcher
24 for both parties upon the portion of railroad hereby leased, and to that extent shall be deemed a common employé, but no part of his wages shall be deemed part of the cost of maintenance; and if the volume of business, or the proper dispatch of the business of either party, shall require one or more train-dispatchers for said portion of the railroad, they shall be employed and act in subordination to the said Erie Company's general train-dispatcher, and shall be deemed common employés. Their office shall be at the said junction at Sharon, or such other place as may be agreed upon by the parties.

Fourth. The engines and trains of said parties shall be given precedence in passing over said road, in the following order:

1st. Passenger trains of the Erie Company.

2d. Passenger trains of the Lake Shore Company.

3d. Freight trains of either party in the order of their arrival or making up.

4th. Freight trains of the Erie Company when trains of both parties are ready simultaneously.

Fifth. The business of both parties shall be conducted in such manner as will reasonably accommodate each, the rights of said Lake Shore Company to the use of said tracks, branches, sidings, switches, passenger and freight stations, depot and storage grounds, water stations, warehouses, terminal facilities and appurtenances, to be equal in all respects to those of said Erie Company, except as otherwise provided, and no obstacle shall be placed in the way of the prompt movement of the traffic of either party; and there shall be no unnecessary detention or delay of movement of engines or trains, but all rules and management shall be such as will cause the least delay and detention consistent with safety and the proper operation of the road.

Sixth. The aforesaid portion of said road, branches, sidings, and terminal facilities hereby leased shall be maintained in good condition by said Erie Company, and an accurate account shall be kept by said Erie Company of the extent and amount of use thereof by the said Erie and Lake Shore Companies, and also of the cost of maintaining said road, including road-bed, bridges, and superstructures, (excepting water stations,) and of the cost of said maintenance, the Lake Shore Company shall pay to said Erie Company such proportion as to the number of its engines and cars passing over said tracks bears to the total number of engines and cars passing over said tracks, (two four-wheeled cars to count as one car and engine as a car,) and also a like proportion of the expenses of conducting transportation on said premises, as hereinafter more particularly stated, not including, however, the expense of train service, settlements therefor to be made monthly.

Seventh. No expenditures in the way of permanent betterments, as distinguished from ordinary repairs, shall be charged to the cost of maintenance, unless with the consent of the said Lake Shore Company, but the cost of replacing worn-out rails shall be considered an element of maintenance. All taxes and assessments which may be levied or assessed upon said premises shall be considered as properly chargeable to the cost of maintenance.

Eighth. Employés of the Erie Company whose duties are solely and directly connected with the maintenance and operation of the said leased road and premises (with the exception of engine and train crews), including yard masters, telegraph operators, and flagmen, shall be deemed common employés, and their salaries and wages shall be chargeable to the cost of maintenance.

Such proportion of the salary and wages of the division superintendent and officers and employés subordinate to him, employed in the care and maintenance of the section or division of said road of which the leased portion forms a part, as the length of the section of road hereby leased bears to the whole division or section upon

which they shall be employed, shall also be charged to the cost of maintenance.

Ninth. In case said Lake Shore Company shall have occasion to take water at any of the water stations on or adjacent to the premises leased, it may do so, paying said Erie Company such proportion of the cost of maintenance of and operating water station, as its use of water station bears to the entire use thereof by both parties.

Tenth. In case said Lake Shore Company shall pay or cause to be paid to the said Erie Company for the rights and privileges hereby granted, in addition to its proportion of the cost of
26 maintenance as aforesaid, the annual rental and compensation of seventy-five hundred dollars ($7,500.00), payable in quarter-annual installments of eighteen hundred and seventy-five dollars ($1,875.00), on the first days of January, April, July, and October in each year, so long as this lease and agreement shall continue in force.

Eleventh. Damages to persons and property by trains of either party, or by the carelessness, negligence and misconduct of employés, or by collision between the trains of the two parties, shall be paid by the party at fault. When it cannot be determined which party is at fault, or when it is probable that one party is as much at fault as the other, the damage shall be borne equally by the parties hereto, provided, however, that neither party shall be liable to the other for or on account of any damages which it may suffer or be made subject to by reason of its trains running off or being thrown from the track, unless caused by collision of the trains of the two parties, in which case the damages shall be adjusted as hereinbefore provided. Neither party shall be liable to the other for damages caused by detention of trains, persons or property, by reason of accidents or causes over which it has no control.

Twelfth. Each party shall bear the burden of any loss or damage which may be caused to it or to property or persons under its charge through the negligence or misconduct of employés, provided that no person shall be employed upon said leased premises or continue in such employment after objection thereto by said Lake Shore Company.

Thirteenth. It is further understood and agreed that said Lake Shore Company may, at its election, terminate this lease and retire from its joint occupancy and use of the portion of said road hereby leased at the expiration of the period of ten, twenty, thirty, forty, fifty, sixty, seventy, eighty, or ninety years from the date hereof, upon its giving written notice to said Erie Company of its election, so to terminate the same at least twelve (12) months before the expiration of any one of said decennial periods; and upon the expiration of such period, after the giving of such notice as aforesaid, the said Lake Shore Company shall be released from its obligations hereunder to pay rental or for maintenance of said road, and the rights to the use of said road shall cease.

27 Fourteenth. In case said Lake Shore Company shall terminate this lease by notice, as above provided, then it is agreed

that thereafter and until the expiration of said term of ninety-nine (99) years, all freight traffic which said Lake Shore Company may have over its lines going from or destined to Middlesex and Sharpsville shall, so far as said Lake Shore Company can control the same, be transported between Sharon and Sharpsville and Middlesex over the said Erie Company's said road, upon such terms and rates as shall be in accordance with the customary usage, rates and terms in vogue among railroads for like service at the time such service is rendered.

Fifteenth. In case it shall become necessary or desirable to construct additional main tracks, siding or branches in order to accommodate the business along the line of said road, or at Sharpsville or Middlesex, and said Erie Company and Lake Shore Company agree that the same shall be constructed, then the said Erie Company shall construct the same, and they shall be regarded as covered by this lease and agreement the same as the tracks now existing, and there shall be paid by said Lake Shore Company thereafter, as additional annual rental therefor, five per cent., (5 %) upon one-half the actual cost of such additional main tracks, branches, or sidings.

Sixteenth. If at any time either of said parties shall desire to construct and lay additional track, branches, siding, or switches, and said parties shall not agree that the same be constructed as above provided, then the party so desiring may, at its own expense, construct the same and have the exclusive use thereof, and the right to remove the same at its pleasure; provided, however, that if at any time after such construction by the Lake Shore Company the Erie Company desires to use such additional track, branch, siding, or switch, it shall have the right to do so upon paying to said Lake Shore Company the cost thereof, and thereafter the Lake Shore Company shall have the right to the joint use of the same during the continuance of this lease, and shall pay as additional rental therefor five (5) per cent. upon one-half (½) the cost thereof, as above provided; and, provided, also that if at any time after such construction by the Erie Company the Lake Shore Company desires to use such additional track, branch, siding, or switch, it shall have the
28 right to do so, and shall pay therefor as additional rental five per cent. (5 %) upon one-half (½) the cost thereof, from and after the time it shall commence such use.

Seventeenth. If said Lake Shore Company shall neglect or refuse to pay said rental, or its proportion of the expenses of maintenance, within six months after the same becomes due, then the term and rights hereby granted shall be forfeited at the option of said Erie Company, and said Erie Company may re-enter upon said premises hereby released, and the said lease shall thereupon be terminated.

Eighteenth. The said New York Company assents to the execution and performance of this lease and agreement, and agrees to and with said Lake Shore Company that, if for any cause the said Erie Company shall forfeit its lease of said road, or surrender said road to said New York Company before the expiration of its lease thereof, then in that event said New York Company will recognize and preserve all the rights of said Lake Shore Company under this

lease and agreement, and will grant and secure to said Lake Shore Company all the rights and privileges it would have had under this lease and agreement had such forfeiture or surrender not occurred, the same in all respects as if said New York Company was party thereto in place of said Erie Company.

Nineteenth. The said Sharon railway assents to the execution and performance of this lease and agreement, and agrees to and with said Lake Shore Company that, if for any cause the said Erie Company or said New York Company shall forfeit their leases of said road, or surrender said road to said New York Company before the expiration of its lease thereof, or in the event that said Sharon railway, for any cause, resume the possession or control of the premises hereby leased, then and in that event, said Sharon railway will recognize and preserve all the rights of said Lake Shore Company under this agreement and lease, and will grant and secure to said Lake Shore Company all the rights and privileges it would have had under this lease and agreement had such forfeiture or surrender or resumption of possession and control not occurred, the same in all respects as if said Sharon railway was party thereto in place of said Erie Company.

29 Twentieth. In case any disagreement shall arise between said Erie Company and said Lake Shore Company in reference to the proper construction of this instrument, or with reference to the rights, privileges or obligations of either party hereunder, the directors of the executive committee of each of said last-named companies shall from time to time, as may be necessary, choose one person (disinterested between the parties), and the two persons so chosen shall choose a third, and the said three persons shall, on reasonable notice in writing to the parties herein, determine any such matter of disagreement; and the parties hereto shall abide by and comply with any decision so made by said three persons, or a majority of them. In case either party shall neglect or refuse to choose a person to act as *as* aforesaid, after twenty days' notice in writing from the other party to make such choice, the party giving such notice may choose two disinterested persons, and the two so chosen shall choose a third to act with them, and the three so chosen, or a majority of them, shall proceed to determine the matter in dispute, in like manner and with like power and effect, as if chosen as first above provided.

Twenty-first. It is further mutually agreed that all the covenants and agreements herein contained shall be obligatory upon the successors and assigns of the respective parties hereto, and that all the rights and privileges herein secured to the respective parties shall pass to and vest in the successors and assigns of said parties respectively.

Twenty-second. It is mutually understood and agreed that the Erie Company becomes a party to this agreement only as lessee of the New York, Pennsylvania & Ohio railroad, and that the covenants herein provided to be performed and the privileges to be enjoyed, by said Erie Company, are to be so performed and enjoyed, respectively only so long as said Erie Company continues to hold

and operate said New York, Pennsylvania & Ohio railroad as lessee, and the New York, Pennsylvania & Ohio Railroad Company continues to hold the Sharon railway as lessee.

In witness whereof, the said parties hereto have respectively caused this agreement to be signed by their proper officers, and their respective corporate seals to be hereunto affixed, the day and year first above written.

30 THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, AS LESSEE OF THE NEW YORK, PENNSYLVANIA & OHIO RAILROAD,
By JOHN KING, *President.*
[Seal N. Y., L. E. & W. R. R. Co.]
Attest: A. R. MACDONOUGH, *Secretary.*

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
By JOHN NEWELL, *President.*
[Seal L. S. & M. S. R'y Co.]
Attest: E. D. WORCESTER, *Secretary.*

THE NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY,
By CHAS. E. WHITEHEAD, *President.*
[Seal N. Y., P. & O. R. R. Co.]
Attest: THOS. WARNOCK, *Secretary.*

THE SHARON RAILWAY,
By E. A. WHEELER, *President.*
[Seal S. R'y.]
Attest: JOHN H. DYNES, *Secretary.*

Endorsed: 143. January term, 1890. Commonwealth of Pennsylvania *vs.* New York, Penna. and Ohio R. R. Co. Agreement as to facts. Filed April 29, 1890. Exhibit "A." (Signed) Edgar L. King.

State Treasurer's Receipt.

EXECUTIVE DEPARTMENT,
TREASURY OF PENNSYLVANIA,
HARRISBURG, *Feb'y* 10, 1890.

Received from New York, Pennsylvania & Ohio Railroad Company six hundred and eighty-two dollars and fifty-one cents on account, to wit: tax on gross receipts for the six months ending June 30, 1889, $682.51.

(Signed) JOHN E. STOTT,
For W. LIVSEY,
State Treasurer.

Registered and countersigned.
(Signed) JAMES H. McALLISTER,
For THOMAS McCAMANT,
Auditor General.

31 *Opinion of the Court of Common Pleas.*

Dauphin C. P., Jan. T., 1890.

COMMONWEALTH *vs.* NEW YORK, PENNSYLVANIA AND OHIO R. R. Co. } No. 143. Appeal from Accounting Officers.

By the COURT:

This case was tried without a jury, under the act of 1874. We find the facts to be as follows:

1. The defendant is a Pennsylvania corporation. It owns and operates a railroad lying wholly within this State, and is engaged in the business of transporting freight and passengers.

2. The Lake Shore and Michigan Southern Railway Company makes use of a part of the defendant's railroad in the manner, for the purposes and upon the terms specified in an agreement made Oct. 1, 1888. This agreement is made a part of this finding.

3. One-half of the transportation by said Lake Shore Railway Company over the railroad of the defendant was of freight and passengers carried by it continuously from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania.

4. The Lake Shore Railway Company has paid to the State the tax upon its gross receipts for the six months ending June 30, 1889, so far as the same were derived from transportation between points both of which are in the State of Pennsylvania.

5. During the said six months the defendant received from the Lake Shore Railway Company the sum of $3,750 in pursuance of said agreement.

6. This settlement taxes the gross receipts of the defendant for the six months ending June 30, 1889, under sec. 7 of the act of 1879, and includes therein the said sum of $3,750.

7. On Feb. 10, 1890, the defendant paid to the State the whole amount demanded, except the tax upon said sum of $3,750.00.

Conclusions of Law.

The questions raised by this appeal are identical with those discussed in Com. *v.* N. Y., Lake Erie & West. R. R. Co., No. 141, Jan. T., 1890, Dauphin C. P., except that of apportionment; and we refer to the opinion there filed for the reasons which support the following conclusions:

1. That the rental paid to the defendant by the Lake Shore Railway Company is "receipts for tolls" within the meaning of sec. 7 of the revenue act of 1879 (P. L., 112).

2. That the taxation of such receipts does not offend against art. IX, sec. 1, of the constitution of Pennsylvania, or against the commerce clause of the Federal Constitution.

3. That such taxation is not, in the case before us, double taxation.

The Commonwealth is entitled to recover as follows:

	Tax eight-tenth- of 1 per cent. upon $3,750	$30 00
32	Int. at 12 per cent. from Nov. 16, 1889, to April 29, 1890.....	1 63
	Attorney general's commission.....	1 50
	Total	$33 13

for which amount we direct judgment to be entered, if exceptions are not filed according to law.

(Signed) JOHN B. McPHERSON, *A. L. J.*

Defendant's Exceptions.

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY. } No. 143.

This case having been tried by the court under the act of 1874, without a jury, defendant files the following exceptions to the decision of the court:

1. The learned court erred in its first conclusion of law, as follows: "That the rental paid to the defendant by the Lake Shore Railway Company is 'receipts for tolls' within the meaning of section 7 of the revenue act of 1879 (P. L. 112)."

2. The learned court erred in its second conclusion of law, as follows: "That the taxation of such receipts does not offend against art. IX, section 1, of the constitution of Pennsylvania, or against the commercial clause of the Federal Constitution."

3. The learned court erred in its third conclusion of law, as follows: "That such taxation is not, in the case before us, double taxation."

4. The learned court erred in not finding as a conclusion of law that the attempted taxation is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes."

5. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $33.13.

6. The learned court erred in not directing judgment to be entered in favor of defendant.

NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY,

(Signed) By its attorney, M. E. OLMSTED.

Order of Court Overruling Exceptions.

And now, to wit, May 27, 1890, the foregoing exceptions are overruled, and judgment is directed to be entered in accordance with

the opinion heretofore filed. To this ruling and judgment defendant excepts, and at its request exceptions sealed.

[SEAL.] (Signed) JOHN B. McPHERSON, *A. L. J.*

33 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following the first Monday of January, A. D. 1891.

Present: The Honorable Edward M. Paxson, chief justice; James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams, James T. Mitchell, and J. Brewster McCollum, justices, and William Pearson, prothonotary, of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district, to May term, 1891, No. 5, it is contained as follows, to wit:

Docket Entries.

NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY, Defendant Below,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below.

Olmsted.

1890, June 11.—Precipe, appeal, affidavit, and recog. filed.
Eo die.—Exit writ of certiorari, r't'ble *sec. reg.*
1891, May 29.—Record returned and filed.
" —Assignments of error filed.
" June 1.—Argued.
1891, June 5th.—Judgment affirmed, *per curiam.*
1891, " —Petition for allocatur of writ of error from Supreme Court of the United States; allocatur of said writ by Hon. Joseph P. Bradley, justice of said court, and said writ of error received and filed; citation from said Hon. Joseph P. Bradley
34 and affidavit of service thereof to Jas. A. Stranahan, deputy attorney general for the Commonwealth of Pennsylvania, and writ of error bond in the sum of one hundred dollars ($100.00) received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

35 In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY.	Certiorari to the Court of Common Pleas for the County of Dauphin, of January Term, 1890. No. 143.

Issue certiorari to the court of common pleas of the county of Dauphin to bring up record and proceedings in a certain action in said court, No. 143, January term, 1890, wherein The Commonwealth of Penna. is plaintiff and The N. Y., Penna. & Ohio R. R. Co. defendant, returnable to next term *sec. reg.*

M. E. OLMSTED,
Att'y for Def't.

To Wm. Pearson, proth'y sup. court, middle district.

36 *Precipe for Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY, Defendant.	Court of Common Pleas of Dauphin County, January Term, 1890. No. 143.

Enter appeal on behalf of defendant above named from a judgment of the court of common pleas of the county of Dauphin.

M. E. OLMSTED,
Att'y for Def't.

To Wm. Pearson, proth'y sup. c't, middle district.

Affidavit.

COUNTY OF DAUPHIN, *ss:*

M. E. Olmsted, being duly sworn, saith that the above appeal is not intended for delay.

M. E. OLMSTED.

Sworn and subscribed this 11th day June, A. D. 1890.

WM. PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

37 *Recognizance.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA	Appeal of Defendant from the Judgment of the Court of Common Pleas for the County of Dauphin, of January Term, 1890. No. 143.
vs.	
NEW YORK, PENNSYLVANIA AND OHIO RAILROAD CO.	

We, The New York, Pennsylvania & Ohio Railroad Company, by *its* attorney-, M. E. Olmsted and A. C. Stamm, severally acknowledge to owe the above-named plaintiff the sum of one hundred dollars upon condition that the above-named defendant do not presecute its appeal with effect; and if the said judgment be affirmed or the appeal be discontinued or nonprossed that defendant will pay the cost adjudged or accruing upon such judgment and all other costs that may be awarded upon such appeal, or else we will do it for said defendant.

NEW YORK, PENNSYLVANIA &
OHIO R. R. CO.,
By its attorney-, M. E. OLMSTED.
A. C. STAMM.

Taken and acknowledged this eleventh day of June, A. D. 1890.
WM. PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

38 MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

We, being willing for certain causes to be certified of the appeal of the New York, Pennsylvania & Ohio Railroad Company from the judgment of the said court in a suit wherein The Commonwealth of Pennsylvania is plaintiff and the said appellant defendant, to No. 143, Jan. term, 1890, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the middle district of said Commonwealth, on the 21 Monday foll. 1 Mon. of Jan., 1891, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon what of right and according to our laws of the said State ought.

Witness the Hon. Edward M. Paxson, doctor of laws, chief justice of our supreme court, at Harrisburg, the 11th day of June, in the

year of our Lord one thousand eight hundred and ninety, and of the Commonwealth the 114th.

WILLIAM PEARSON,
Prothonotary.

39 [Endorsed:] No. 5. May term, 1890. Supreme court, middle district. Commonwealth of Pennsylvania *vs.* New York, Pennsylvania & Ohio R. R. Co., appellant. Certiorari sur-appeal to the court of common pleas for the county of Dauphin. Returnable the 21 Mon. foll. 1 Monday of Jan., 1891. "Rule on the appellee to appear and plead on the return day of the writ." N. B. 10 days' notice to the parties or their counsel below necessary to compel an appearance.

The record and process, with all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send, as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]

I certify that recognizance for costs in $100, with M. E. Olmsted and A. C. Stamm as bail, has been duly filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

Due service admitted.

JOHN F. SANDERSON,
Deputy Attorney General.

Filed in supreme court, middle district, May 29, 1891.

40 *Assignments of Error.*

1. The learned court erred in its first conclusion of law, as follows: "That the rental paid to the defendant by the Lake Shore Railway Company is 'receipts for tolls' within the meaning of section 7 of the revenue act of 1879, (P. L. 112.)"

2. The learned court erred in its second conclusion of law, as follows: "That the taxation of such receipts does not offend against art. IX, section 1, of the constitution of Pennsylvania, or against the commerce clause of the Federal Constitution."

3. The learned court erred in its third conclusion of law, as follows: "That such taxation is not, in the case before us, double taxation."

4. The learned court erred in overruling defendant's fourth exception, which was as follows:

"The learned court erred in not finding as a conclusion of law that the attempted taxation is in violation of that clause of section 8 of article I of the Constitution of the United States, which confers upon Congress the power to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.'"

5. The learned court erred in not sustaining the fifth objection specified in defendant's appeal, which was as follows:

"The New York, Pennsylvania & Ohio Railroad Company, having paid, or proposing to pay, into the State treasury, the sum of $882.51, being the full tax at eight mills upon the company's receipts from tolls and transportation, or from express business wholly within the State of Pennsylvania, it is not indebted to the Commonwealth in any further sum, and the balance claimed in the settlement hereby appealed from is erroneously and illegally charged."

6. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $33.13.

7. The learned court erred in not directing judgment to be entered in favor of defendant.

41 COMMONWEALTH
vs.
NEW YORK, P. & O. R. R. Co., Appellant. } No. 5. May Term, 1891.

* * * * * * *

Per Curiam:

These cases were argued together. The opinion of the learned judge below in No. 7, of May term, covers substantially all the questions presented, and we affirm the judgment in each case upon said opinion.

[Endorsed:] Nos. 5, 6, 7, & 8. May T., 1891. Commonwealth *vs.* R. R. Companies. Aff'd, P. C. Filed June 5th, 1891. Copy.

42 *Return to Writ of Error from Supreme Court of the United States.*

And now here, on this day, to wit, August 6th, 1891, the said The New York, Pennsylvania & Ohio Railroad Company produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

43 To the Honorable Joseph P. Bradley, justice of the Supreme Court of the United States:

The petition of the New York, Pennsylvania & Ohio Railroad Company respectfully showeth—

That your petitioner is a corporation created by and existing under the laws of several States, including the State of Pennsylvania, and owns a railroad extending from Salamanca, New York, to

Dayton, Ohio, passing through Pennsylvania a distance of about 92 miles. It connects at a point in Pennsylvania with the railroad of the Lake Shore & Michigan Southern Railway Company, a corporation whose lines extend from Buffalo, New York, to Chicago, Illinois, through the States of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois.

That the Lake Shore & Michigan Southern Railway Company, by agreement, has the right of trackage over a portion of the road of your petitioner for the transportation of coal, freights, merchandise, express, and mails in consideration of the payment of $7,500 per annum, payable on the first days of January, July, April, and October in each year. One-half of the transportation under said trackage agreement was and is of freight and passengers by continuous transportation upon a single way bill or ticket from points in Pennsylvania to points in other States or from points in other States to points in Pennsylvania.

Section 7 of the Pennsylvania statute of June 7, 1879 (P. L., 112), requires that each railroad and transportation company doing business in said State "shall pay the State treasurer for the use of the Commonwealth a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business," payable semi-annually, &c., and for the six months ending June 30, 1889, the auditor
44 general and State treasurer settled against your petitioner an account for tax on gross receipts wherein was embraced a tax of 8 mills upon $3,750, being two quarterly payments for trackage aforesaid.

That from said account, agreeably to the laws of Pennsylvania, your petitioner entered an appeal to the court of common pleas of Dauphin county, averring in said appeal that the transportation in respect of which said sum of $3,750 was paid was wholly interstate transportation and that the attempted taxation thereof was in violation of the commerce clause of the Federal Constitution.

That the court of common pleas of Dauphin county found as a fact that "one-half of the transportation by the said Lake Shore Railway Company over the railroad of the defendant was of freight and passengers carried by it continuously from points in Pennsylvania to points in other States or from points in other States to points in Pennsylvania," but nevertheless held as a conclusion of law "that the taxation of said receipts does not offend against article IX, section 1, of the constitution of Pennsylvania, or against the commerce clause of the Federal Constitution."

That your petitioner filed exceptions to said decision, among which were the following:

45 "The learned court erred in its second conclusion of law, as follows: 'That the taxation of such receipts does not offend against art. IX, section 1, of the constitution of Pennsylvania, or against the commercial clause of the Federal Constitution.'"

"The learned court erred in not finding as a conclusion of law that the attempted taxation is in violation of that clause of section 8 of article I of the Constitution of the United States which

confers upon Congress the power to 'regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

That your petitioner's said exceptions were overruled and judgment entered May 27, 1890, in favor of the Commonwealth of Pennsylvania and against your petitioner for a tax of 8 mills upon $3,750, together with interest at 12 per centum per annum and attorney general's commission, amounting in the whole to $33.13.

That your petitioner appealed from said judgment to the supreme court of Pennsylvania, to No. 5, May term, 1891, in the middle district thereof, and assigned as error the overruling of the aforesaid exceptions.

That after hearing the said cause the supreme court of Pennsylvania refused to sustain the assignments of error, and entered an order upon the fifth day of June, A. D. 1891, affirming the judgment of the court of common pleas of Dauphin county.

That the supreme court of Pennsylvania, in which the case was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of said court is final.

That the judgment of said court, as already shown, necess-
46 involved the decision of a Federal question, and the said decision is in favor of the State law and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefore your petitioner (herewith presenting a bond, with security, for approval) prays that a writ of error may be allowed to issue to the said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction in that which violates the Constitution and the laws thereof, and that the citation to the defendant may accompany the same; and it will ever pray, &c.

Harrisburg, Pa., July 7, 1891.

THE NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

Presented to me & allowed July 22d, 1891.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

47 [Endorsed:] In U. S. Supreme Court. New York, Pennsylvania & Ohio Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Petition for allocatur. M. E. Olmsted. Filed in supreme court, middle district, Aug. 6, 1891.

48 Know all men by these presents that we, The New York, Pennsylvania & Ohio Railroad Company and William H. Metzger and A. C. Stamm, of the city of Harrisburg and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of one hundred dollars ($100), to be paid to the said Commonwealth of Pennsylvania

or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a court of common pleas in and for the county of Dauphin, State of Pennsylvania, in a suit depending in said court between the Commonwealth of Pennsylvania and the New York, Pennsylvania & Ohio Railroad Company, in which judgment was rendered against the said New York, Pennsylvania & Ohio Railroad Company, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a suit in said court, of May term, 1891, No. 5, in the middle district of said court, and the said New York, Pennsylvania & Ohio Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court
49 of the United States to be holden at Washington within thirty days from the date of the said writ of error:

Now, the condition of the above obligation is such that if the said New York, Pennsylvania & Ohio Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NEW YORK, PENNSYLVANIA & OHIO RAILROAD COMPANY,
(Signed) By CHAS. E. WHITEHEAD, *President.*

Attest:
[SEAL.] (Signed) E. TUPPER, *Secretary.*
(Signed) W. H. METZGER.
" A. C. STAMM.

Signed, sealed, and delivered in presence of—
(Signed) J. T. WANN.
" A. J. SMALLWOOD.
" RUSSELL P. BUTLER.

Approved by—
JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

UNITED STATES OF AMERICA, } ss:
Litchfield, Connecticut, }

Alexander C. Stamm maketh oath and saith that he is worth thirty-five hundred dollars after all his debts are paid, and that he knows William H. Metzger, the other surety in the foregoing bond, and believes him to be worth fifteen thousand dollars after all his debts are paid.

(Signed) A. C. STAMM.

Sworn and subscribed before me July 22, 1891.
(Signed) JOSEPH P. BRADLEY,
Asso. Justice Sup. Court U. S.

[Endorsed:] Copy. In U. S. Supreme Court. New York, Pennsylvania & Ohio Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Bond. Filed in supreme court, middle district, Aug. 6, 1891.

50 *Certificate.*

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to 48, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of the State of Pennsylvania, the highest court of law and equity in that State, in the case lately depending therein, to No. —, May term, A. D. 1891, wherein The New York, Pennsylvania & Ohio Railroad Company was appellant and The Commonwealth of Pennsylvania was appellee, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 6th day of August, A. D. 1891.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

Endorsed on cover: Case No. 14,802. Pennsylvania supreme court. No. 266. The New York, Pennsylvania & Ohio Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed August 13, 1891.